Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

DENISE DEGROAT,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the Sixth Circuit's failure to address Appellant's critical issue of the trial judge committing plain error in holding Denise DeGroat responsible for nine ounces of crack cocaine when no attempt was made to determine her individual agreement regarding cocaine is contrary to the requirement in all the circuits that the trial judge make individual findings.

## PARTIES TO THE PROCEEDINGS

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## PETITION FOR WRIT OF CERTIORARI

Denise Degroat respectfully prays that a writ of certiorari be issued to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this case on April 20, 2000.

## OPINIONS OF THE COURTS BELOW

The order of the Court of Appeals entered April 20, 2000, appears in the Appendix at 6. The Judgment Conviction of the United States District Court for the Eastern District of Michigan appears in Appendix 2.

## JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction pursuant to 28 U.S.C. Section 2101 to consider granting a Petition for Writ of Certiorari from a Judgment on an appeal as of right from the judgment from the United States District Court. The United States Court of Appeals for the Sixth Circuit entered an unpublished decision on April 20, 2000, denying Petitioner's appeal as of right appears in Appendix 7.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States of America, which is set forth in the Appendix. The

statute involved is 42 U.S.C. Section 1983, the pertinent portions of which are set forth in the Appendix.

## STATEMENT OF THE CASE

Denise DeGroat, and others, appealed as of right from a Judgment of the United States District Court for the Eastern District of Michigan, Northern Division entered on January 22, 1998. The Notice of Appeal was timely filed on January 23, 1998. Subject matter jurisdiction of the case was established by 28 USC Section 1331, 1345, 1355. Appellant's jurisdiction for an appeal as of right to the Sixth Circuit was established by 28 USC Section 1291, 1294.

## CONCISE ARGUMENT FOR REASONS TO GRANT A WRIT OF CERTIORARI

The Sixth Circuit's unpublished opinion failed to address Denise DeGroat's argument that the trial judge committed plain error in holding her responsible for nine ounces of crack cocaine when no attempt was made to determine her individual agreement regarding cocaine. Rule 52(b) of the Federal Rules of Criminal Procedure allows the appellate court to correct plain errors which affect the Defendant's substantial rights. Authorities cited in the appeal brief filed below established that Appellant's burden was to show that the error was plain from the record and secondly that a miscarriage of justice resulted. (*United States v. Thomas*, 11 F.3d 620 (6th Cir. 1993), *cert. denied*, 511 U.S. 1040 (1994). *United States v.*

*Hachett*, 918 F.2d 631, 641 (6th Cir. 1990), *cert. denied*, 501 U.S. 1223 (1991).

The error by the trial court was in not making specific findings regarding the quantity of drugs to assess Denise DeGroat for her part in the conspiracy as required by Federal Sentencing Guidelines 1 B 1.3. A sentencing court *must* first determine the scope of each Defendant's agreement with others, and then determine if drugs contributed to others were reasonably foreseeable to that Defendant within the scope of the agreement. See also *United States v. Weakly*, 118 F.3d 575-578 (8th Cir. 1997).

Generally, the circuits have stressed the need for specific findings on the quantity of drugs that were reasonably foreseeable to each Defendant. See *United States v. Anderson*, 39 F.3d 331, 353 (D.C. Cir. 1994) (remanded for "specific, individualized findings regarding the quantity of drugs each appellant might have reasonably foreseen his or her agreed upon participation would involve" involved Judges's findings regarding the quantity of drugs each appellant might have reasonably foreseen his or her agreed upon participation would involve"), vacated in part on other grounds, 59 F.3d 1323 (D.C. Cir. 1995) en banc; *United States v. Studley*, 47 F.3d 569 (2nd Cir. 1995) must be a particularized finding as to the scope of jointly undertaken acitivity.

In *United States v. Rogers*, 982 F.2d 1241, 1246 (8th Cir. 1993) (the court: finding that "by virtue of the conspiracy conviction" LSD sales attributed to co-defendant are also attributable to Defendant was insufficient statement of reasons): *United States v. Lanni*, 970 F.2d 1092, 1093 (2d Cir. 1992) (remanded: must make specific findings of

drug amounts reasonably foreseeable by each coconspirator) (5#2); *United States v. Perkins*, 963 F.2d 1523, 1528 (D.C. Cir. 1992) (remanded; court must make express finding that drugs possessed by Co-Defendant were foreseeably *United States v. Chavez-Gutierrez*, 961 F.2d 1476, 1481 (9th Cir. 1992) (remanded: court must make express finding that Defendant was accountable for drugs distributed by others before the date of Defendant's drug offense); *United States v. Blankenship*, 954 F.2d 1224, 1227-28 (6th Cir. 1992) (remanded for specific findings as to whether Defendant knew or should have known that Co-Defendant possessed other drugs, or that object of conspiracy was to possess such drugs); *United States v. Puma*, 937 F.2d 151, 159-60 (5th Cir. 1991) (remanded: District Court must make specific finding of amount each conspirator knew or should have known or foreseen was involved; conviction does not automatically mean every conspirator foresaw total amount involved). See also *United States v. Mitchell*, 964 F.2d 454, 458-61 (5th Cir. 1992); (remanded: while Defendant had previously purchased small amounts of cocaine, there was no evidence that he knew the conspiracy was dealing with twenty kilograms); *United States v. Johnson*, 956 F.2d 894, 906-07 (9th Cir. 1992) ("minor" participant in drug conspiracy can be sentenced only for drugs distributed before he was taken into custody). (*United States v. Green*, 175 F.3d 822 (10th Cir. 1999) remanding for more particularized findings on scope of conspiracy). *United States v. Collado*, 975 F.2d 985, 990-95 (3rd Cir. 1992) as individualized inquiry into each Defendant's involvement is critical.

Therefore, the trial court's failure to make particularized findings with regard to Petitioner necessary to

properly determine her relevant conduct and base offense level was contrary to the expressed rule of most circuit courts of appeal. In failing to address the issue, the Sixth Circuit compounded the error since the lower court ruling of the 255.15 grams of crack cocaine result in an exceedingly long sentence of 192 months was rendered without due process since the rules were obviously not followed.

The other problem in regards to Denise DeGroat was the fact that her role in the conspiracy was not alleged to be that of a drug seller but simply using her position as a police officer to give information to members of the conspiracy so that the conspiracy could supposedly be protected. The date when she entered the conspiracy was never clear from the testimony at the trial and the other problem caused by the lack of particularized findings for Denise DeGroat was that it was not clear whether the nine ounce transaction that she was held responsible for occurred before or after she entered into the conspiracy.

The original Pre-Sentence Report, App. 30, simply indicated on Paragraph 32 that "Ms. DeGroat is being held responsible for 255.5 grams of crack cocaine." This amount was determined by the first delivery by Eugene Beaver in early January of 1993.

No objection was ever made by a trial counsel and no attempt was made by him to develop the factual record regarding this finding of 255.5 grams of crack cocaine. This amount was determined by the first delivery by Eugene Beaver in early January of 1993. No objection was ever made by a trial counsel and no attempt was made by

him to develop the factual record regarding this finding of 255.5 grams.

The obvious miscarriage of justice rendered to Denise DeGroat was established by the fact that the Government admitted during closing arguments that Denise DeGroat was never alleged to have handled any cocaine or took part in any cocaine sales transaction appears in Appendix 6. There was no evidentiary basis to hold Ms. DeGroat responsible for nine ounces of crack cocaine. The nine ounces was based on Eugene Beaver's testimony that he arrived in Michigan from California during the first two weeks of January of 1993 when he then delivered nine ounces to Celester DeGroat at Mr. DeGroat's residence appears in Appendix 3 and that Mr. DeGroat, petitioner's brother, then distributed cocaine to various several individuals who were selling it for him appears in Appendix 4. Beaver then testified that, at *some later point* Denise DeGroat came by and warned her brother Celester not to sell drugs because the house was under surveillance appears in Appendix 5. There was no testimony regarding several crucial facts that could have tied Denise DeGroat to the nine ounces of crack cocaine such as no statements made by Denise to her brother about the presence of either the nine ounces of cocaine or any of the individuals that received portions of it. There is no testimony that Denise DeGroat had ever seen the nine ounces or that anyone had ever told her that a nine ounce shipment was arriving. There is further no evidence that any cocaine transaction ever took place in her presence. While Celester DeGroat did keep some of the nine ounces he received from Beaver, there was no testimony that Denise DeGroat was aware of this or that any of those drugs

were in the house when she came over supposedly on January 28, 1993. Denise DeGroat's statement warning about the surveillance on January 28, 1993, would have been at least two weeks after Beaver arrived and distributed the nine ounces to Celester DeGroat.

The correct approach by the trial court would have been to take the quantity of drugs that Alfreda Brewer was prepared to sell the undercover officer in August of 1993 and perhaps add to that amount what Celester DeGroat had left over from the nine ounces after he had distributed most of it before the warning statement by Denise DeGroat.

Interestingly enough, the Sixth Circuit never ruled as the Government asked them to waive this issue because her trial counsel, failed to raise the issue before the trial court. This court should either remand this issue back to the Sixth Circuit for further consideration and findings, or in the alternative, find plain error on the part of the trial court, reversing the Sixth Circuit and remanding the case back to the trial court for particularized findings regarding Denise DeGroat's relevant conduct and base offense level. Only in this way, can the error of the Sixth Circuit be corrected and the procedure followed in the other circuits as cited in this petition be properly made to be consistent.

## CONCLUSION

Petitioner prays that the Order of the Sixth Circuit date be reversed and that her sentencing be remanded

back to the trial court for particularized findings of drug quantities and a redetermination of her base offense level.

Dated: August 11, 2000

ROBERT J. DUNN (P33726)
*Attorney for Denise DeGroat*

## APPENDIX

Nos. 97-2224, 97-2248, 97-2270, 97-2343, 97-2344, 98-1012, 98-1015, 98-1076, 98-1155.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Dante Antoine Beaver, Lemont Nash, Demont Nash, Andre Lamont Pruitt, Celester Raymond Degroat, Denise Degroat, Vennis Delon Liles

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan.

(Filed April 20, 2000)

Before: MERRITT, KENNEDY, and SILER, Circuit Judges.

KENNEDY, Circuit Judge. This appeal arises from the convictions of seven defendants for their involvement in a drug conspiracy in Saginaw, Michigan. One defendant, Celester DeGroat brings claims arising out of his jury conviction and two defendants, Andre Pruitt and Denise Degroat, bring claims arising out of their jury convictions and sentences. In addition, four defendants, Demont Nash, Lemont Nash, Vennis Liles, and Dante Beaver, appeal the sentences imposed after they entered guilty pleas. Although the defendants raise numerous claims of error, we find that only one – defendant Denise Degroat's

claim of error arising out of her conviction under 18 U.S.C. § 2232 – is meritorious. For this reason we AFFIRM the district court in part, and REVERSE in part.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit, if cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

## I. Facts

On January 15, 1997, a grand jury returned an indictment in which the defendants[1] were charged with conspiracy to distribute crack cocaine and possession with intent to distribute crack cocaine. Four defendants pled guilty to count two of the indictment, possession with intent to distribute, while three defendants proceeded to trial.

Prior to trial, defendant Celester Degroat testified at the sentencing hearing of an unindicted co-conspirator. He was subpoenaed by the co-conspirator's attorney and appeared before the court without obtaining the advice of

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[1] On January 29, 1997 defendants were charged in a superseding indictment which added defendant Denise Degroat to the conspiracy charge. In this indictment defendant Denise Degroat also was charged with two violations of 18 U.S.C. § 2232(b).

his attorney about the matter. The co-conspirator's attorney told the defendant he had the right not to testify, but he did not inform the defendant that his testimony could be used against him. The prosecuting attorney and the trial judge, both scheduled to participate in defendant's trial, did not advise the defendant of his right not to incriminate himself. Defendant was cross-examined by the prosecuting attorney on numerous aspects of his role in the conspiracy. Upon learning of this testimony, defendant's counsel requested that the indictment be dismissed on grounds that his client's Fifth and Sixth Amendment rights had been violated. This request was denied, as was his request for an evidentiary hearing, his motion to recuse the judge, and his motion to suppress the use of any evidence obtained from this testimony.

At trial, the prosecution presented the testimony of Eugene Beaver. Witness Beaver described his involvement with the defendants. He stated that in 1993 he purchased nine ounces of cocaine for defendant Celester Degroat and transported it to Saginaw, Michigan from California. Beaver and Degroat went to the Nash residence and Beaver watched Degroat distribute the cocaine to several individuals, including defendants Demont and Lemont Nash and Andre Pruitt. Beaver indicated that he continued to supply defendant Degroat and his gang, except for a lapse of approximately six months, throughout the time-frame of the conspiracy. Beaver's testimony, though not always consistent in every particular detail, described in great detail the operations of this organization.

The prosecution also introduced the testimony of numerous other witnesses, including government informants and undercover officers. The testimony revealed the existence of the 4-KP gang who controlled the drug trade on the streets of Fourth and Kirk in Saginaw, Michigan. Witnesses testified to numerous sales of drugs by the defendants and to the existence of weapons throughout the area to protect the members. Additional evidence demonstrated that defendant Denise Degroat, a Saginaw police officer, provided members of the gang with information about investigations of their activities and offered to assist the members on occasion. In particular, Officer Leatherman testified that DeGroat recognized Leatherman at the Saginaw police station and later warned Alfreda Brewer not to engage in a drug transaction with Leatherman by shouting "Don't Freida girl. No. No. No. No. No, Frieda girl." Brewer ran away and did not complete the transaction.

The jury convicted defendants Pruitt and Celester Degroat for violations of 21 U.S.C. §§ 841(a)(1) and 846. Defendant Denise Degroat was convicted of a violation of 21 U.S.C. § 846 and for obstructing a search under 18 U.S.C. § 2232(b). All defendants appeared before the trial judge for sentencing. The four defendants who pled guilty appeal their sentences, while the three defendants who proceeded to trial appeal their convictions and Pruitt and Denise DeGroat appeal their sentences.

## II. Discussion

On this appeal, six defendants challenge the district court's factual findings as to their sentences.[2] In addition, defendants Denise Degroat and Pruitt challenge their convictions under 21 U.S.C. § 846 on grounds of insufficient evidence. Defendants Celester Degroat and Pruitt contend that the prosecutor violated 18 U.S.C. § 201(c)(2) when he introduced the testimony of co-conspirators. They also contend that the district court erred in making numerous evidentiary decisions. These three defendants also bring individual claims of error in the trial proceedings. Defendant Pruitt raises two claims: (1) whether the jury pool violated *United States v. Ovalle*, 136 F.3d 1092 (6th Cir.1998) and (2) whether his trial should have been severed from the other defendants.[3] Defendant Denise Degroat raises two claims: (1) whether there was sufficient evidence to support her conviction under 18 U.S.C. § 2232(b) and (2) whether the trial judge's bias made the trial fundamentally unfair. Defendant Celester Degroat raises one claim: (1) whether his Fifth and Sixth Amendment rights were violated due to his testimony at a co-

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[2] Celester DeGroat did not appeal his sentence.

[3] Defendant Pruitt also attempts to incorporate the claims of the other defendants in his appeal. Fed. R.App. P. 28(i) states: "In cases involving more than one appellant or appellee, . . . any appellant or appellee may adopt by reference any part of the brief of another." There is a limit to this rule in that only those arguments that are readily transferable from one appellant's case to another's are permissible. *See United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1998). Thus, defendant Pruitt's incorporation is construed only to encompass those claims of the other defendants that are not fact-specific.

conspirator's sentencing hearing. We address each of the defendants' claims below.

*1. Motion to Sever*

Defendant Pruitt argues that the district court erred in denying his motion to sever. He contends that he was prejudiced by the joinder of his trial with Denise and Celester Degroat because his role in the offense was minimal compared to his co-defendants. Rule 8(b) of the Federal Rules of Criminal Procedure makes joinder in this case permissible, while Rule 14 permits severance if one of the defendants is prejudiced by a joint trial. "There is a preference for joint trials of defendants who are indicted together." *United States v. Odum*, 13 F.3d 949, 958 (6th Cir. 1994). In *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 938, 122 L.Ed.2d 317 (1993), the Supreme Court held that if defendants are properly joined, a judge should grant a severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." This court reviews the district court's decision to deny the severance motion for abuse of discretion. *See Odum*, 13 F.3d at 958.

We find that the defendant has procedurally defaulted this claim because he did not preserve it for appeal. He did not raise this issue in the district court, thus, he has waived the issue.[4] *See United States v.*

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[4] Prior to being charged in the indictment in this case, defendant Pruitt was charged in a separate indictment for one

*Ghazaleh*, 58 F.3d 240, 243 (6th Cir. 1995). In addition, we believe that this claim can be denied on the merits. The defendant does not identify a specific right that was violated by the court's refusal to grant his severance motion, rather he claims that his general right to a fair trial was violated. He contends that the introduction of evidence of his co-defendants' actions prejudiced his defense. Even if the defendant's trial had been severed, the evidence of which he complains would have been admissible at his trial. The evidence introduced at trial was necessary to establish the existence of the conspiracy, one of the elements of the charged offense; thus, the defendant has not demonstrated prejudice.

2. *Ovalle Claim*

Defendant Pruitt raises an *Ovalle* claim asking this court to reverse his conviction due to an improper jury pool. In support of his claim, the defendant offers only the fact that this Circuit ruled in *United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998), that the Eastern District of Michigan's jury pool was improperly selected based on race. He states that because his trial occurred while the Eastern District used improper jury pools he is

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count of distribution of cocaine and one count of attempted distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). The defendant filed a motion to sever for trial on this indictment. The court denied this motion as moot because no other defendants were scheduled to be tried with the defendant. When the defendant was joined with the co-defendants in the new indictment and charged with conspiracy, he failed to raise the severance issue.

entitled to relief. The defendant has defaulted his *Ovalle* claim because he did not raise an objection to the jury venire prior to jury selection. Failure to raise an objection to the selection of the grand or petit jury prior to trial "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." Fed.R.Crim.P. 12(f); *see also United States v. Oldfield,* 859 F.2d 392, 396 (6th Cir. 1988). This court has held previously that relief from Rule 12(b)(2) requirements is appropriate only where the district court has made a finding of "cause and actual prejudice." *Id.* at 397. In his brief submitted to this court, defendant does not provide any evidence that establishes either "cause" or "prejudice." Without the presentation of this type of evidence, there is no basis to grant the defendant's requested relief.

*3. 21 U.S.C. § 846*

Defendants Pruitt and Denise Degroat appeal their convictions under 21 U.S.C. § 846 on the grounds that there was insufficient evidence to support their convictions. This court reviews challenges to the sufficiency of the evidence to determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Avery,* 128 F.3d 966, 971 (6th Cir. 1997). The defendants must satisfy a heavy burden to establish insufficiency of the evidence. *See United States v. Vannerson,* 786 F.2d 221, 225 (6th Cir. 1986). We find that the defendants fail to satisfy this burden.

To show that a defendant has violated 21 U.S.C. § 846, the prosecutor "must prove (1) an agreement to violate drug laws; (2) knowledge and intent to join the conspiracy; and (3) participation in the conspiracy." *United States v. Layne*, 192 F.3d 556, 567 (6th Cir. 1999). The evidence adduced at trial of the existence of a conspiracy was significant. Witnesses Beaver and Irvin testified that the 4-KP gang was an organization that distributed drugs on the streets of Fourth and Kirk in Saginaw. These witnesses testified to the numerous sales of drugs they witnessed. Beaver also testified to witnessing the distribution of drugs he provided to defendant Celester Degroat among the numerous individuals involved in the conspiracy. Further testimony was provided by the police officers involved in uncovering the conspiracy. Viewing all of this evidence in the light most favorable to the prosecution, we believe that there was abundant evidence of a conspiracy.

Finding that there was sufficient evidence of a conspiracy introduced at trial, this court must then determine whether there was sufficient evidence of the defendants' participation in the conspiracy. The prosecution is not required to prove that the defendants participated in every part of the conspiracy. Instead, a jury can convict the defendants on a finding of only a slight connection if that finding is supported by sufficient evidence to prove that connection beyond a reasonable doubt. *See United States v. Ward*, 190 F.3d 483, 488 (6th Cir. 1998). We find that the evidence introduced at trial establishes that both defendants had, at the very least, a slight connection to the conspiracy and that the connection was proved beyond a reasonable doubt.

At trial, there was no evidence introduced that established that defendant Denise Degroat ever possessed or distributed cocaine; however, evidence was introduced that demonstrated that the defendant was aware of the existence of the conspiracy and that she attempted to prevent the conspiracy from being discovered. Acting to assist a conspiracy further its goals is a sufficient connection to the conspiracy to support a conviction under 21 U.S.C. § 846. *See Odom,* 13 F.3d at 959. Witness Beaver testified that the defendant warned defendant Celester Degroat that the house from which he was distributing drugs was under surveillance. Undercover officer Leatherman testified that the defendant warned another co-conspirator not to sell to the officer after the defendant had seen the officer at the police station. Witness Irvin testified that the defendant, a Saginaw police officer, had done nothing when drugs were in her presence. He also stated that the defendant asked him not to press charges against her cousin and that, in exchange, she would use her job as a Saginaw police officer to assist him. Additional testimony also linked her to the conspiracy. This evidence is sufficient to support her conviction.

Although the amount of evidence introduced at trial connecting defendant Pruitt to the conspiracy was not as great as the evidence introduced against his co-defendants, it was still significant. Beaver testified that Pruitt was present when the first shipment of drugs from California were distributed by defendant Celester Degroat. Witness Foote testified that she had purchased drugs from Pruitt over one hundred times in the location where the 4-KP gang was known to sell drugs. Other witnesses also testified to seeing Pruitt in the location on numerous

occasions. Based on this evidence, we believe that a reasonable trier of fact could find that the defendant had knowledge of the conspiracy and was a willing participant.

*4. 18 U.S.C. § 2232(b)*

Defendant Denise Degroat contends that the trial court erred in denying her rule 29 motion to acquit on grounds of insufficient evidence to support a conviction under 18 U.S.C. § 2232(b). Because the defendant did not renew her motion at the end of the government's rebuttal case the government argues that she has not properly preserved this issue for appeal. *See United States v. Williams*, 940 F.2d 176, 180 (6th Cir. 1991) (holding that defendants must renew their motion for acquittal at the close of all the evidence or it will be deemed waived). We find that the defendant did waive her objection, so this court will review her conviction for plain error and can reverse only if there is a "manifest miscarriage of justice." *United States v. Price*, 134 F.3d 340, 350 (6th Cir. 1998). Defendant's argues that her conviction should be reversed because the government did not prove that a search or seizure of Alfreda Brewer was imminent when she warned Brewer not to sell to undercover officers. We, however, believe that her conviction should be reversed because the trial court's instructions to the jury on this count were erroneous. While the defendant failed to object to the instruction in the district court and did not raise the erroneous instruction on appeal, we have discretion to act upon plain error if the error affects substantial rights and we believe that it would be a manifest injustice

if the error is not corrected. *United States v. Hoglund*, 178 F.3d 410, 412 (6th Cir. 1999). We believe that the district court's instructions on this count constitute plain error requiring reversal.

Section 2232(b) provides:

> [w]hoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(b) (West 1984 & Supp.1999). The trial judge instructed the jury that "an undercover purchase or intended undercover purchase of cocaine base by an officer with or without the help of a civilian informant, is a seizure of that drug." This instruction is contrary to the Supreme Court's holding in *Maryland v. Macon*, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). The Court held that the voluntary transfer of a possessory interest in a good is not a seizure because a seizure requires an "interference with an individual's possessory interests in the property seized." *Id.* at 469, 105 S.Ct. at 2782. The trial court's erroneous instruction allowed the jury to find defendant guilty of violating this statute if they found that she had prevented the sale of drugs. Because this is not a permissible basis upon which to convict the defendant of interfering with a search or seizure we reverse the conviction on this count of the indictment. We, however,

do not believe that the defendant is entitled to the entry of a judgment of acquittal on this count because we cannot say that the evidence presented at trial would not support a conviction. For this reason, we remand this count to the district court for a new trial.

*5. Judicial Bias*

Defendant Denise Degroat contends that she was denied her right to a fair trial due to the bias of the district court judge. We find that this argument fails because the defendant's claim is based solely on evidentiary and judicial rulings made by the trial judge. Defendant alleges that the judge demonstrated his bias by allowing the introduction of certain evidence that the defendant identifies as prejudicial and irrelevant. She also proffers the judge's favorable treatment of the prosecuting attorney and contrasts it with the judge's unfavorable treatment of the defense attorneys. Lastly, she accuses the judge of engaging in improper questioning of witnesses, oftentimes acting as a prosecuting attorney. After a review of these alleged incidences of judicial bias, we find that no one single act constitutes impermissible action on the part of the judge and that the combination of all these permissible actions also does not establish any judicial bias.

In *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), the Supreme Court set forth the standard for assessing whether judicial bias has prevented the defendant from receiving a fair trial. The Court noted that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion,"

nor do "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases." *Id.* at 555, 114 S.Ct. at 1157. Because all of the defendant's allegations of bias fall into either the category of judicial rulings or judicial remarks the defendant has not demonstrated that judicial bias existed making a fair trial an impossibility.

> Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

*Id.* at 555-56, 114 S.Ct. at 1157. We believe that, rather than constituting inappropriate behavior, the district court judge's actions were justified as "ordinary efforts at courtroom administration." Finding that the defendant's trial was not infected by judicial bias, we deny the defendant's claim.

*6. Fifth and Sixth Amendment Violations*

Defendant Celester Degroat appeals his conviction on the grounds that it was obtained in violation of his Fifth and Sixth Amendment rights to a fair trial. Prior to the commencement of his trial, defendant was subpoenaed to testify at the sentencing hearing of a co-conspirator. The co-conspirator's attorney who issued the subpoena advised the court that he had spoken with the

defendant's attorney and was informed that the defendant's attorney would recommend that the defendant exercise his Fifth Amendment rights not to testify if the co-conspirator called him to the stand. Because the defendant's attorney had not spoken with his client, he asked the co-conspirator's attorney to adjourn the sentencing hearing. The hearing was adjourned as requested and rescheduled. Although the co-conspirator's attorney stated at the sentencing hearing that he attempted to inform the defendant's attorney of the new date for the sentencing hearing, he admitted that he never spoke directly to the attorney with respect to the date. At the sentencing hearing the defendant was called to the stand and was asked whether he had spoken with his attorney. The defendant stated that he had not, but that he was willing to testify. The co-conspirator's attorney advised the defendant that he had the right not to testify, but he did not inform him as to the consequences of his testifying – i.e, that anything he testified to could be used against him.[5] The defendant testified and was cross-examined by the assistant United States attorney who was conducting the trial against the defendant. The

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[5] Q: Do you understand you would have the right to remain silent and not testify, but if you wished to waive that right you can testify regarding your dealings or lack of dealings with Torrye Gilbert?

A: Yes.

Q: Do you wish to testify or not testify?

A: Yes.

Q: Yes, you wish to testify?

A: Yes, on behalf of Gilbert.

defendant's testimony was heard by the judge who was hearing the defendant's case.

Upon learning that the defendant had testified at the sentencing hearing, the defendant's attorney filed motions requesting that the trial judge recuse himself from the defendant's case, that an evidentiary hearing be held to determine what information the prosecution had obtained from the defendant's testimony, and that the prosecution be prohibited from using any information obtained from the defendant's testimony at the defendant's trial. All of these requests were denied by the trial judge, although the prosecuting attorney indicated that he had no intention of using any information obtained in his case-in-chief. Defendant argues that the use of this information in any manner constitutes a violation of his Fifth and Sixth Amendment rights to a fair trial.

Initially, it should be noted that this claim is not accurately stated as a violation of the defendant's *Miranda* rights. *Miranda* applies only to custodial interrogations. *See United States v. Myers*, 123 F.3d 350, 359 (6th Cir. 1997). In *Myers*, this Circuit reviewed the relevant Supreme Court case law and noted that the circuits that had addressed the issue were reluctant to require *Miranda*-like warnings before taking grand jury testimony of suspects. *Id.* at 359-60. Finding that the suspect had received adequate notice of his right not to incriminate himself, the court found no *Miranda* violation. The situation in this case differs slightly from *Myers;* however, we believe that no *Miranda* violation occurred in this case either. Although the defendant was not specifically informed in the courtroom of the fact that his testimony could be used against him, he had received *Miranda*

warnings upon his arrest for the charges involved in this case. He, unlike an individual who is just a suspect, had specific knowledge of the government's interest in his testimony. Because the Sixth Circuit has not required that witnesses be given *Miranda*-like warnings prior to their testimony the trial court is required only to assess the voluntariness of the defendant's waiver of his rights, whether it was made in a knowing and intelligent manner. *See Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). We find that the trial court made a correct determination that the defendant voluntarily waived his rights.

Defendant was an educated man[6] who had been informed of his Fifth Amendment rights when he was arrested. He had obtained an attorney and had spoken with him, although not about this particular matter, prior to taking the stand to testify. His statements in the courtroom prior to his testimony indicate that he understood what he was doing. The trial judge was aware of all these factors when he made his determination and also had the benefit of assessing the defendant's willingness to testify firsthand. In light of these circumstances, we believe the district court did not err in finding that the defendant voluntarily waived his rights prior to testifying at the sentencing hearing.

Defendant also contends that the court's failure to warn him of the implications of his testimony violated his Sixth Amendment right to a fair trial. For defendant's

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[6] In his cross-examination at the Torrye Gilbert sentencing hearing and at trial, defendant presented himself as a college student.

argument to prevail, he has to establish that the court had a duty to inform him of his Fifth Amendment right not to incriminate himself. This Circuit has held that a trial judge has the discretion to warn a witness, thus, this court must review the trial court's failure to give this warning for an abuse of discretion. *See United States v. Arthur*, 949 F.2d 211, 215-16 (6th Cir. 1991). We find that the trial judge did not abuse his discretion by failing to warn the defendant that his testimony could be used against him at his trial. In *Arthur*, this Circuit reversed a conviction on the grounds that the trial judge had abused his discretion by actively encouraging a witness to invoke his Fifth Amendment rights. *Id.* at 216. A trial judge has to balance the rights of the defendant against the rights of the witnesses. We believe that the judge may give greater weight to the rights of the defendant in the matter before the court even though the witness may be a defendant in another matter. Accepting that the court must consider the co-conspirator's right to a fair trial, we do not think that the district court judge violated the defendant's Fifth and Sixth Amendment rights to a fair trial by failing to warn him that his testimony could be used against him.

*7. 18 U.S.C. § 201(c)(2)*

Defendants Pruitt and Celester Degroat claim that the trial court erred in permitting the testimony of witnesses Beaver and Irvin because this testimony was obtained in violation of 18 U.S.C. § 201(c)(2) which prohibits the giving of anything of value in order to procure a witness' testimony. Even if the defendants have not procedurally defaulted this claim by failing to bring a

motion to suppress the witnesses' testimony prior to trial, the claim has no merit. In *United States v. Ware*, 161 F.3d 414, 419-21 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 1348, 143 L.Ed.2d. 511 (1999), this Circuit held that 18. U.S.C. § 201(c)(2) does not apply to prosecuting attorneys offering leniency in sentencing. The court also stated that even if this statute applied to prosecuting attorneys, the exclusionary rule does not apply to the testimony of witnesses who were offered lighter sentences in exchange for their testimony. *Id.* Based on this decision, we deny the defendants' claim.

*8. Evidentiary Rulings*

Defendants Pruitt and Celester Degroat contend that the trial court erred in making certain evidentiary decisions. Defendant Pruitt argues that the introduction of defendant's mug shots into evidence was more prejudicial than probative. Defendant Pruitt defaulted this claim because he did not object to the evidence at trial; however, defendant Pruitt's brief incorporates other defendant's arguments and defendant Celester Degroat did object at trial and has raised this issue on appeal. Defendant Celester Degroat argues that the district court erred in permitting the introduction of prejudicial photos and in denying his request to introduce into evidence a rap song. This court reviews a trial court's evidentiary decisions for an abuse of discretion. *See Layne*, 192 F.3d at 573.

We find that the trial court did not abuse its discretion in admitting the mug shot photo of defendant Pruitt. This photo was used by the prosecution to aid its witnesses in identifying the defendant. Because it was not

unreasonable for the court to infer that the defendant's appearance in the courtroom differed significantly from his appearance during the time of the conspiracy this evidence's probative value outweighs its prejudicial effect. *See United States v. Padin*, 787 F.2d 1071, 1079 (6th Cir. 1986) ("[W]hen a defendant appears at trial dressed in his Sunday best the prosecutor is entitled to show his appearance when arrested.")

The district court also did not abuse its discretion in accepting into evidence the "gang" photos. Defendant Celester Degroat directs this court to consider its unpublished decision in *United States v. Hendrix*, No.94-1404, 1995 WL 218472 (6th Cir. Apr. 12, 1995), in reviewing this claim. In *Hendrix*, the court held that the use of gang photos was so prejudicial that the defendant's conviction had to be reversed. *See id.* at *3. This case differs significantly from *Hendrix* because it involves a gang conspiracy. In *Hendrix*, the defendant was being tried for possession of cocaine, with intent to distribute. The court believed that the introduction of gang evidence played on the fears of the jury and was intended to show the defendant's proclivity for engaging in bad acts. *See id.* at *2. In this case, the central issue was the existence of a conspiracy and evidence about the existence of a gang was probative on that issue. Because this evidence was relevant and more probative than prejudicial the district court did not abuse its discretion in admitting it into evidence.

Defendant Celester Degroat's argument that the district court should have permitted the introduction of his rap song also is not persuasive. The rap song was hearsay as it was being offered for the truth of the matter

asserted. *See* Fed.R.Evid. 801(c) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). The song contained lyrics that the 4-KP gang was a music group who did not do drugs and would not participate in violence. Defendant contends that the trial court admitted prosecution evidence that was hearsay; therefore, the court erred in refusing to admit this evidence. Even if defendant's contention that the court allowed the prosecutor to present hearsay evidence is accurate, it is not grounds for finding that the district court abused its discretion in refusing to admit this evidence. In addition, the court found that a defense witness could testify to the contents of the song and that the introduction of the tape would be cumulative. Because the information on the tapes was permitted into evidence through the testimony of a witness the defendant cannot demonstrate that he was prejudiced by the court's refusal to admit this evidence.

*9. Sentencing*

All defendants, except Celester DeGroat, appeal their sentences. Defendants' primary claim of error is that the district court improperly calculated the drug amounts attributable to each defendant. Defendant Lemont Nash raises an additional claim that the district court erred in calculating his criminal history. Defendant Vennis Liles's claim of error about the drug amount differs from the other defendants in that he challenges the district court's determination of relevant conduct. In addition, he raises two other claims of error. He contends that the trial court

improperly enhanced his sentence for possession of a dangerous weapon. He also argues that the district court erred in finding that he was an organizer or leader of the conspiracy.

This court reviews a district court's factual findings as to the quantity of controlled substance for which a defendant is responsible for clear error. *See United States v. Brannon*, 7 F.3d 516, 520 (6th Cir. 1993). "The government bears the burden of proving, by a preponderance of the evidence, that the trial court should attribute a particular quantity of drugs to a defendant." *Layne*, 192 F.3d at 578. Defendants' main argument in support of their contention that the district court erred in calculating their drug amount is that the evidence upon which the trial judge based his findings was not credible. They contend that the witnesses who testified at trial and before the grand jury were not credible because they were convicted drug offenders and addicts. We believe that the district court's finding that this evidence was credible is not clear error.

a. Witness Credibility

The defendants[7] challenge the drug quantities attributed to them on the basis that the evidence upon which the district court relied is unreliable. The district court's determinations were based on the amounts identified in each individual defendant's PSI report. Defendants contend that the PSI reports were incorrect in that they

[7] This discussion excludes defendant Vennis Liles' challenge which is discussed infra.

inappropriately relied on the testimony of witnesses Beaver, Irvin, Foote, and Neal. Witness Beaver and Irvin had been convicted of serious drug charges and were cooperating with the prosecutor in an attempt to reduce their sentences. Witnesses Foote and Neal were recovering drug addicts. The testimony of these witnesses relied on by the PSI reports occurred either in their grand jury testimony or at the trial of three of the co-conspirators. While there are some inconsistencies in their testimony the district court judge had the opportunity to evaluate their credibility. We see no basis on which to find the district court's decision clearly erroneous.

b. Lemont Nash

Defendant Lemont Nash appeals his sentence on the grounds that the court improperly calculated his criminal history. The PSI report gave defendant one point for his conviction for possession of open intoxicants and one point for his conviction for transporting open intoxicants, resulting in a criminal history category of two. Defendant contends that these convictions should not have been included in his criminal history category pursuant to § 4A1.2(c). Section 4A1.2(c) sets forth those misdemeanor sentences which should be counted and excluded when calculating a defendant's criminal history. Neither of the defendant's convictions are directly referenced in this section. The defendant contends that these convictions should be treated like public intoxication which is never counted. U.S.S.G. § 4A1.2(c)(2). A conviction that falls into the category of included misdemeanor sentences should be counted only if the sentence for the conviction

was for a term of probation of one year or a term of imprisonment of thirty days or if the conviction is similar to the instant offense. U.S.S.G. § 4A1.2(c)(1). Because neither of these convictions resulted in any sentence of imprisonment or probation the district judge must have determined that these convictions were similar to the offense of distributing drugs.

Although we think the district court may have been wrong in making this determination, we do not think it is plain error. The defendant did not object to the PSI report containing the criminal history at the sentencing hearing; thus, he has waived his right to appeal his sentence on this grounds. *See also United States v. Barajas-Nunez*, 91 F.3d 826, 830 (6th Cir. 1996) ("Generally, a failure to object at sentencing forfeits any challenge to the sentence on appeal."). An appellate court, however, may review a sentence for plain error. *See United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998) ("Where, as here, a criminal defendant has failed to object below, he or she must demonstrate that the error was plain as defined by Fed.R.Crim.P. 52(b) before we may exercise our discretion to correct the error.). "To establish plain error, a defendant must show (1) that an error occurred in the district court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Id.* In calculating the defendant's criminal history, the district court was required to make a determination of whether the defendant's convictions were similar to his instant offense. While the guidelines provided some assistance, it is not obvious and clear that

these offenses were not similar to the instant offense.[8] Because it was not plain error for the district court to find that these two convictions were similar to distribution of drugs we must deny defendant's request for relief.

c. Defendant Vennis Liles

Defendant Liles challenges the district court's findings of the appropriate drug quantity on the grounds that the trial judge improperly considered conduct that was not relevant. In addition to this claim, he raises two other claims of error. He contends that the district court was clearly erroneous in finding that he was a leader of the organization. He also argues that the district court erred in enhancing his sentence for possession of a dangerous weapon. We find that the district court did not err in considering defendant Liles' drug activities as relevant conduct or in enhancing his sentence.

Defendant contends that the drug amounts attributed to him in the PSI report because of his 1993-94 purchases are not relevant conduct and cannot be utilized in determining his sentence. Defendant argues that for these activities to be relevant conduct the prosecution must show that they were part of the same course of conduct or common scheme or plan. U.S.S.G. § IB1.3, commentary, applic. n. 9. We do not believe the district court's factual

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[8] We disagree with the dissent's contention that the view of this Circuit on this issue is clear. The case cited in the dissent is an unpublished decision and not binding. *See* 6th Cir. IOP 206. We do not believe it was plain error for the district court judge not to know of this opinion.

findings on this issue are clearly erroneous. Witness Foote testified that she began purchasing crack cocaine in 1993-1994 and continued until her arrest in September of 1996. During that time she purchased from the defendant more than fifty times. This evidence was sufficient to demonstrate that the defendant engaged in a course of conduct beginning in 1993 and continuing into 1996. In addition, witnesses Beaver and Irvin testified that defendant was a leader of this organization. The court was not clearly erroneous in finding that this evidence demonstrated that the 1993-1994 purchases were part of a common course of conduct in furtherance of the conspiracy of which the defendant was one of the leaders.

Like the other defendants, defendant Liles contests the district court judge's use of certain witnesses' testimony in making his sentencing determination, and like the claims of the other defendants, his claims also must fail. There was evidence introduced at trial supporting both sentence enhancements. Witnesses Beaver and Irvin testified at trial that Liles was the leader of the older members of the 4-KP gang. Witness Beaver identified two individuals over whom defendant Liles executed control while witness Irvin identified four additional individuals over whom Liles executed control. Section 3B1.1(a) of the sentencing guidelines directs a sentencing judge to increase the defendant's offense level "if the defendant was an organizer or leader of criminal activity that involved five or more participants." U.S.S.G. § 3B1.1(a) (1998). We find that the evidence of the defendant's leadership role in the 4-KP gang was sufficient to support the district court's enhancement of the defendant's sentence.

Defendant Liles challenges not only the evidence supporting the district court's decision to enhance his sentence for possession of a dangerous weapon, but the district court's conclusion that his possession of a weapon while engaging in conduct relevant to his conviction is a legitimate grounds on which to enhance his sentence. Section 2D1.1(b)(1) provides that a district court should enhance a defendant's sentence "if a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1) (1998). This provision of the sentencing guidelines was amended in 1991 to delete the language "during commission of the offense." Appendix C of the sentencing guidelines states that this amendment was intended to clarify that the relevant conduct provision, § 1B1.3(a)(2), applies to adjustments in § 2D1.1(b)(1). U.S.S.G.App. C, amend. 394 (1998). Accepting that a defendant's sentence can be enhanced where the possession of the weapon occurred during conduct relevant to the offense, we find that the district court did not err in enhancing the defendant's sentence. Witness Beaver testified that all members of the gang carried guns and that there were guns located at different locations around Fourth and Kirk of which all gang members were aware. Witness Foote, who stated that she had purchased drugs from the defendant numerous times, testified that all of the conspirators carried weapons when conducting drug transactions. In this case, the testimony supported a finding that the defendant possessed a weapon during the sales of drugs found to be relevant conduct. Because the district court's finding that this testimony is credible is not clearly erroneous, we affirm the district court's factual findings.

## III. Conclusion

For the foregoing reasons, the district court's judgment and sentences are affirmed except for defendant Denise Degroat's conviction under Count 6 of the superseding indictment in Case No. 96-20004 for a violation of 18 U.S.C. § 2232(b). We remand this count to the district court for a new trial.

**MERRITT, Circuit Judge, concurring in part and dissenting in part.** With respect to the additional criminal history point assessed against Lamont Nash for his conviction under Michigan law for driving with open intoxicants, our opinion in *United States v. Scott*, 1 F.3d 1243 (1993), held that a defendant should not receive criminal history points for conviction of Michigan's open intoxicant law. The law to this effect in our Circuit appears to be plain and established by a clear holding. Because Nash was sentenced to 120 months – the top of the range – a reduction in his criminal history points would affect his sentence by giving him a maximum of 108 months – a year less than the sentence he received. I would remand the sentence in Nash's case and require that the district court resentence Nash.

Beyond that point I am concerned that there may have been Fifth and Sixth Amendment violations when Celester DeGroat was brought from his jail cell without his lawyer over to District Judge Cleland's court and intensely cross-examined about the crime for which he was about to be tried. It seems to me that there is a severe Sixth Amendment problem here, and I would remand the case to the district court for a full evidentiary hearing and findings of fact and conclusions with respect to this

unfortunate incident. The court permitted DeGroat to be examined without his lawyer and without advising him that he had a right to have his lawyer present. It appears to me that the testimony which he gave at that hearing may very well have been prejudicial to him at his later trial.

Otherwise, I concur in Judge Kennedy's opinion for the court.

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**

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| **UNITED STATES OF AMERICA** | **PRESENTENCE INVESTIGATION REPORT** |
| **vs.** | **Docket No.** |
| **DENISE DeGROAT** | 97-CR-20004-BC-11 and 96-CR-20042-BC-01 |

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| | |
|---|---|
| Prepared For: | The Honorable Robert H. Cleland<br>United States District Judge |
| Prepared By: | John D. Ade<br>United States Probation Officer<br>(517) 894-8831 |
| *Assistant U.S. Attorney* | Michael J. Hluchaniuk<br>204 Federal Building<br>Bay City, MI 48708<br>(517) 895-5712 |
| *Defense Counsel* | William M. Hatchett (Retained)<br>485 Orchard Lake Road<br>Pontiac, MI 48341<br>(248) 334-1587 |
| Sentence Date: | December 10, 1997 |
| Offense: | **97-CR-20004-BC-11**<br>Count 1: 21 U.S.C. § 846, Conspiracy to Possess with Intent to Distribute Cocaine Base; a Class B Felony; 5-40 years and/or a $2,000,000.00 fine; at least 4 years supervised |

release; and a $100.00 special assessment fee.

**96-CR-20042-BC-01**
Count 2: 18 U.S.C. § 2232(B), obstruction of justice; a Class E Felony; 5 years and/or a $250,000.00 fine; and a $100.00 special assessment fee.

Release Status: A $25,000 unsecured bond was set on October 2, 1996. Upon conviction, the defendant's bond was revoked and the defendant has been detained in federal custody since September 15, 1997.

Detainers: None

Codefendants: None

Related Cases: Celester Raymond DeGroat II – 97-CR-20004-BC-01
Honorable Robert H. Cleland; found guilty by a jury on September 9, 1997 of the First Superseding Indictment and of the counts contained in the 96-CR-20046-BC-01 Indictment; awaiting sentence.

Demont Anthon Nash – 97-CR-20004-BC-02
Honorable Robert H. Cleland; pled guilty April 17, 1997 to Count 1 of the Superseding Indictment in 96-CR-20044-BC-01; sentence not to exceed the midpoint of the applicable

guideline range; awaiting sentence.

Demont Lajuan DeGroat – 97-CR-20004-BC-04
Honorable Robert H. Cleland; sentenced October 30, 1997 on Counts 2 and 4 of the Indictment in 96-CR-20048-BC-02 to 46 months each count, concurrent; guideline range 46 to 57 months; no departure.

Lemont Tawn Nash – 97-CR-20004-BC-05
Honorable Robert H. Cleland; pled guilty August 7, 1997 to Count 1 of the Indictment in 96-CR-20049-BC-01; sentence not to exceed the midpoint of the applicable guideline range; awaiting sentence.

Dante Antionne Beaver – 97-CR-20004-BC-06
Honorable Robert H. Cleland; pled guilty August 6, 1997 to Count 1 of the Superseding Indictment; sentence not to exceed the midpoint of the applicable guideline range; awaiting sentence.

Derrick Adrian Williams – 97-CR-20004-BC-07
Honorable Robert H. Cleland; sentenced June 9, 1997 on Count 1 of the Superseding Indictment in 96-CR-20055-BC-01 to 168 months custody;

guideline range 168 to 210 months; no departure.

Alfreda Monique Beaver – 97-CR-20004-BC-08
Honorable Robert H. Cleland; pled guilty August 7, 1997 to the Superseding Indictment; sentence not to exceed the midpoint of the applicable guideline range; awaiting sentence.

Andre Lamont Pruitt – 97-CR-20004-BC-10
Honorable Robert H. Cleland; found guilty September 9, 1997 of the Superseding Indictment and of Counts 1 and 2 in the 96-CR-20060-BC-01 Indictment; awaiting sentence.

Date Report Prepared:
10/21/97

Date Report Revised:

**Identifying Data:**

| | |
|---|---|
| Date of Birth: | February 26, 1958 |
| Age: | 39 |
| Race: | Black, Non-Hispanic |
| Sex: | Female |
| SSN No: | 363-64-2382 |
| FBI No: | 381625DB3 |
| USM No: | 16803-039 |
| Other ID No: | MI O.L.N. D-263-139-744-148 |
| Education: | Bachelors Degree in Criminal Justice |
| Dependents: | Two |
| Citizenship: | United States |
| Legal Address: | 1418 Chatham Drive Saginaw, MI 48601 |
| Aliases: | Nee Nee |

[Picture Omitted In Printing]

DeGROAT, Denise 09/09/97
PRESENTENCE
DOB: 02/26/58
SSN: 363-64-2382 125 lbs.

**PART A. THE OFFENSE**

**Charge(s) and Conviction(s)**

1. A criminal complaint was sworn before Magistrate Judge Charles E. Binder on October 1, 1996 by Special Agent Walter H. Reynolds of the Federal Bureau of Investigation (FBI). Mr. Reynolds stated that on or about August 28, 1996, in the Eastern District of Michigan, Northern Division, DENISE DeGROAT

did obstruct a felony investigation in violation of 18 U.S.C. § 2232(b).

2. DENISE DeGROAT was arrested on October 2, 1996 and was taken before Magistrate Judge Binder for an initial appearance. The defendant was granted one week to obtain appointed counsel or the Court would appoint one for her. The defendant was released on a $25,000.00 unsecured bond.

3. A Federal Grand Jury returned a one-count Indictment against DENISE DeGROAT on October 21, 1996. Count 1 charges that on or about August 28, 1996, DENISE DeGROAT did obstruct a felony investigation in violation of 18 U. S. C. § 2231(b).

4. MS. DeGROAT and her attorney, William Hatchett, appeared before Magistrate Judge Binder on October 22, 1996 for arraignment. MS. DeGROAT stood mute. A plea of not guilty was entered by the Court; bond was continued; and the defendant and her attorney signed an Acknowledgment of the Indictment.

5. On January 29, 1997, a Superseding Indictment was filed charging two counts of obstruction of a felony investigation in violation if [sic] 18 U.S.C. § 2232(b). Also, included was a First Superseding Indictment charging one count of conspiracy to possess with intent to distribute cocaine base in violation of 21 U.S.C. § 846. This First Superseding Indictment was on Docket Number 97-CR-20004-BC-11.

6. MS. DeGROAT and her attorney appeared before Magistrate Judge Binder on January 31, 1997 for arraignment. Ms. DeGROAT stood mute and a plea of not guilty was entered by the Court. Bond was continued and the defendant and her attorney signed an Acknowledgment of the Indictment.

7. On August 18, 1997, a Supplemental Order of Consolidation was signed by the Honorable Robert H.

Cleland as to the defendants Celester DeGroat, Andre Pruitt and DENISE DeGROAT.

8. A jury trial commenced before the Honorable Robert H. Cleland on August 18, 1997. On September 9, 1997, the jury found DENISE DeGROAT guilty on Count 1, conspiracy to possess with intent to distribute cocaine base on Docket Number 97-CR-20004-BC-11 and Count 2, obstruction of justice on Docket Number 96-CR-20042-BC-01.

9. Pretrial Services Officer Janet Rotunno advises the defendant had reported on a regular basis and had presented no problems while on bond supervision. MS. DeGROAT's bond was revoked upon her conviction by the Federal Grand Jury. The Court allowed MS. DeGROAT to voluntarily surrender five days after the date of her conviction. She complied on September 15, 1997.

**The Offense Conduct**

10. The following information was obtained through a review of the available file material, as well as discussions with the defendant, defense counsel, case agent, and/or the Assistant U.S. Attorney in charge of the prosecution of this case.

11. From approximately April 1996, Special Agent Walter Reynolds of the Federal Bureau of Investigation (FBI) had been involved in an investigation related to drug trafficking activities on 4th and Kirk (4KP gang). Members of the gang sold drugs on the street at 4th and Kirk, 3rd and Kirk, and 3rd and Norman, in Saginaw, Michigan and from various houses located in the general vicinity.

12. According to Eugene Beaver, he and Celester DeGroat grew up living next door to one another in Compton, California. In the mid- to late-1980's,

Celester DeGroat moved to Michigan. Subsequently, he would visit his mother in California approximately *once per year. In or around January 1993,* while at home visiting his mother, Celester talked to Eugene Beaver and discussed the difference in prices that drugs could be sold for in Saginaw, Michigan versus Compton, California. He informed Mr. Beaver that a lot of money could be made if he brought drugs from California and sold them in Saginaw. He further indicated that his sister was a police officer in Saginaw, Michigan and could let them know if they were being watched or if an investigation was taking place. Mr. DeGroat related that he had "a little gang" in Saginaw called the 4th and Kirk Posse (4KP). He would distribute the drugs through them.

13. Mr. Beaver's first trip to Saginaw, Michigan was made in early- to mid-January 1993. At that time, he transported nine ounces of crack cocaine inside a pillow which he took with him on a Greyhound bus. He was picked up at the bus station by Celester DeGroat and Andre Miller. He was taken to Lemont and Demont Nash's father's home. Other people present during that time included Lemont and Demont Nash, Erick and Derrick Williams, James Lewis, Terrance Liles, and Shawn (last name unknown).

14. Mr. Beaver further related that Celester DeGroat's sister, DENISE DeGROAT, who is a Saginaw police officer, stopped by the house on 9th Street and told Celester DeGroat that he had better stop selling rocks out of that house because the house was under surveillance by the Saginaw Police. She was not on duty at the time.

15. After remaining in Saginaw, Michigan for approximately two weeks, Eugene Beaver returned to California. After paying his source for the drugs, he

obtained 18 ounces of crack cocaine and returned to Saginaw two days later. This occurred in late January 1993. He was picked up at the bus station in Flint by Celester DeGroat, Lemont Nash, and James Lewis. After stopping at Mr. DeGroat's grandmother's house to "bust the drugs up," they went to the house on 9th Street again. Four ounces of crack were distributed to Torey Gilbert and two ounces of crack were given to James Lewis and Erick and Derrick Williams, and Lemont and Demont Nash. After remaining in Saginaw, Michigan for approximately three weeks, Mr. Beaver returned to California. He had only received $3,000.00 from Celester DeGroat prior to leaving Saginaw, Michigan. He never received the remaining $4,000.00 from Mr. DeGroat. As a result, he did not do business with Mr. DeGroat again until November of 1993.

16. In February 1993, Beaver was at a birthday party for DENISE DeGROAT at a club in Saginaw. Beaver felt nervous about some of the police officers who were present and confronted Fred Ervin about his concerns. During this party, DENISE DeGROAT approached the two and told them that if they were being investigated, she would let them know. Fred Ervin, himself, had asked OFFICER DeGROAT on at least one occasion if she could find out what was going on as far as he himself being investigated, and DENISE DeGROAT told him that she was unable to tell him because all of that occurs "upstairs." However, she did state that she could find out about pending raids.

17. In November 1993, Celester DeGroat approached Eugene Beaver and informed him that he would be going to California and asked him if he could "hook it up" for him to receive some drugs while out in California. Subsequently, Mr. Beaver contacted

sources in California and made the arrangements for Mr. DeGroat to receive nine ounces of crack cocaine. Mr. Beaver gave Mr. DeGroat instructions on how to send it through the mail so that it would look like a birthday gift. The next day, Mr. DeGroat sent it to Michigan by UPS.

18. According to Mr. Beaver's trial testimony, the same pattern was followed in January 1994, resulting in Mr. DeGroat's receiving an additional nine ounces of crack cocaine.

19. In the fall of 1993, Deonte DeGroat was staying at the residence of his mother, Police Officer DENISE DeGROAT (aka Nee Nee). During that time, Larry Johnson was also involved in drug trafficking in 1993 and part of 1994 and became good friends with a Deonte DeGroat, the son of DENISE DeGROAT and a member of the 4KP gang. Johnson also became a close, personal friend of a female cousin of DENISE DeGROAT and saw DENISE on a regular basis in early 1994. While at the DeGroat residence in the presence of DENISE DeGROAT, a man named Chuck, who Johnson believed was DENISE DeGROAT's brother, asked Johnson if he would be willing to sell some heroin and cocaine for him. Johnson agreed that he would. Johnson noted that all of this occurred in the presence of DENISE DeGROAT. Johnson stated that he later met Chuck in Detroit and obtained approximately $1,000.00 in heroin and $5,000.00 in crack cocaine and brought the drugs back to Saginaw.

20. Johnson said that while he was weighing and packaging the drugs he received from Detroit, DENISE DeGROAT approached him and warned Johnson that the FBI had a warrant for his arrest. Johnson told OFFICER DeGROAT that he already knew of the warrant.

21. In January 1994, Celester DeGroat again approached Beaver regarding drugs, and Beaver, at this time, set up another transaction for Celester DeGroat for nine ounces of crack. Beaver was also supplying drugs to others in Saginaw, including Fred Ervin.

22. Derrick Williams and Celester DeGroat then went to Eugene Beaver's apartment in Saginaw, Michigan on or about April 1994, and indicated they were going to California to get drugs and asked if he could "hook it up again" for them. Mr. Williams and Mr. DeGroat were each going to get nine ounces of cocaine for a total of 18 ounces of cocaine.

23. In May of 1994, Eugene Beaver was in California and was approached by Celester DeGroat who indicated that Derrick Williams had gone to California to purchase 18 ounces of cocaine. Mr. Beaver took Mr. DeGroat and Mr. Williams to the drug source to obtain the cocaine. They then took it back to Celester DeGroat's mother's house where Mr. Williams and Mr. DeGroat cooked it into crack cocaine. Subsequently, they packaged it and sent it to Saginaw, Michigan.

24. In June of 1994, Derrick Williams and Celester DeGroat returned to California for a kilogram plus nine ounces (45 ounces) of crack cocaine. Mr. Beaver set up the transaction after obtaining the crack. It was mailed to Michigan the next day by UPS Air.

25. According to Mr. Beaver, the last drug transaction occurred in July of 1994 when Celester DeGroat and Derrick Williams returned to California and purchased a kilogram and a half of crack cocaine (54 ounces). Again, Mr. Beaver made the arrangements, drugs were obtained, and they were sent in a package to Michigan.

26. In the summer of 1994, Fred Ervin became concerned about being investigated and approached DENISE DeGROAT on this issue. She advised him that certain information could not be obtained by her, but she agreed to find out whether certain cars that had been seen were police cars. Ervin gave her a description of the two cars and DeGROAT advised him that these two vehicles were undercover vehicles. Also, in the summer of 1994, Ervin was in need of drugs for sale and went to Celester DeGroat to buy them. DeGroat sold Ervin nine ounces of crack (4.5 ounces on each of two occasions). Shortly after Ervin was arrested in October 1994, Ervin called his then girlfriend who was an acquaintance of DENISE DeGROAT's and asked the girlfriend to warn DENISE DeGROAT that she was under investigation.

27. Although a number of people affiliated with the 4KP gang were also arrested in October of 1994, the activities associated with selling crack cocaine near 4th and Kirk and 3rd and Norman continued into 1995 and 1996. In the spring of 1996, law enforcement officers began an investigation of drug trafficking activities in the 4th and Kirk area. The investigation included making undercover purchases from individuals who would approach cars in the area and offer to sell crack. Purchases were made by undercover officers and informants between March and September of 1996. On June 25, 1996, Andre Pruitt approached a vehicle in the 3rd and Norman area and offered to sell crack cocaine to the occupants. The vehicle was being driven by an undercover officer who purchased a quantity of crack cocaine from Pruitt. The amount of crack purchased from Pruitt was determined to be .21 of a gram.

28. On July 17, 1996, undercover officers and cooperating individual Ashley Neal were again in the 3rd and Norman area attempting to purchase drugs. Their vehicle was approached by a number of individuals including Celester DeGroat. DeGroat sold a quantity of crack to an undercover officer (.28 of a gram) and then walked over to a car that pulled up to the area. DeGroat was heard to say to the female driver of that vehicle, later identified as DENISE DeGROAT, something to the effect that the people in the undercover vehicle were the subject of an earlier conversation between Celester and DENISE DeGROAT. Celester DeGroat then returned to the undercover vehicle and sold a quantity of crack cocaine (.28 of a gram) to Neal.

29. On August 22, 1996, the female undercover officer, Detective Leatherman, who had been in the 3rd and Norman area purchasing drugs, went to the Saginaw Police Department with two other detectives. At that location, they encountered DENISE DeGROAT who engaged one of the detectives in conversation and then came to the undercover vehicle and looked into the backseat where the undercover officer was seated.

30. During the evening of August 28, 1996, Detective Leatherman attempted to purchase crack cocaine in the 3rd and Norman area in her vehicle and was approached by Alfreda Brewer who was apparently going to sell the officer a quantity of crack. Before the transaction could be completed, a white car drove up and a person in the back seat, identified by Detective Leatherman as DENISE DeGROAT yelled, "No, Freda, girl, no, no, no, no, Freda, girl." This warning caused Brewer to not complete the transaction and to leave the area. Detective Leatherman went to the same area again on September 3, 1996

and encountered Alfreda Brewer, who accused the officer of being a police officer and stated that someone had told her that she was with the police. During this exchange on September 3, 1996, Andre Pruitt approached the police vehicle and asked the officer what she wanted, which was an apparent reference to how much drugs the officer was interested in purchasing. Alfreda Brewer approached Pruitt and made the comment to Pruitt about the person being a police officer. Pruitt then put the drugs back in his pocket and left the area immediately.

31. The following day, Detective Leatherman returned to the area and Celester DeGroat yelled at her from the porch of a residence in the area that he knew she was the police. The officer came back to the same area on September 16, 1996 and Celester DeGroat and another person were dealing with another vehicle when the officer drove up next to them and attempted to purchase drugs. DeGroat responded by saying to Detective Leatherman that her money was not good there and refused to sell the officer drugs. At that point that phase of the investigation was terminated since it was clear the officer was known to be the police and no further purchases could be made.

32. MS. DeGROAT is being held responsible for 255.15 grams of crack cocaine (nine ounces). This amount was determined from the first delivery by Eugene Beaver in early January of 1993. MS. DeGROAT's involvement assisted in the continuation of the drug conspiracy. At least 150 grams but less than 500 grams of cocaine base produces a base offense level of 34.

**Victim Impact**

33. For purposes of the presentence report, this is considered a victimless crime.

**Adjustment for Obstruction of Justice**

34. According to 3C1.1, Application Note 6, indicates that where the defendant is convicted of both an obstruction offense and an underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense in the subsection of 3D1.2, groups of closely related counts. The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the two-level adjustment for obstruction of justice specified in this section. Therefore, a two-level increase will be administered.

**Adjustment for Acceptance of Responsibility**

35. The defendant is not entitled to any adjustment for acceptance of responsibility since she put the government to its burden of proof at trial by denying the essential factual elements of guilt.

**Offense Level Computations**

36. The November 1, 1995 edition of the *Guidelines Manual* has been used in this case.

37. **Base Offense Level:** The guideline for a violation of 21 U. S. C. § 841 (a) (1) is located at 2D1.1(a)(3) which refers the reader to the drug quantity table. In this case the defendant is being held responsible for 225.15 grams of crack cocaine per 2D1.1(c)(3). A base offense level of 34 is suggested. 34

38. **Specific Offense Characteristics:** Per 3B1.2(b), the defendant was a minor participant in the criminal activity and should receive a two-level decrease. -2

39. Per 3B1.3, the defendant abused her position of public trust in a manner that significantly facilitated the commission of the offense and should receive a two-level increase. +2

40. **Victim Related Adjustment:** 0

41. **Adjustment for Role in the Offense:** 0

42. **Adjustment for Obstruction of Justice:** Per 3C1.1, Application Note 6, a two-level increase shall be applied. +2

43. **Adjusted Offense Level (Subtotal):** 36

44. **Adjustment for Acceptance of Responsibility:** As indicated above, the defendant does not qualify for any reduction. 0

45. **Total Offense Level:** 36

46. **Chapter Four Enhancements:** 0

47. ***Total Offense Level*:** 36

## PART B. THE DEFENDANT'S CRIMINAL HISTORY

### Adult Criminal Convictions

48. MS. DeGROAT has no adult criminal convictions that can be scored under the guidelines.

### Criminal History Computation

49. The defendant has no prior criminal convictions. The total of the criminal history points is zero. According to the sentencing table, the defendant is placed in the Criminal History Category I.

**Other Criminal Conduct**

50. None.

**Pending Charges**

51. None.

**Other Arrests**

52. None.

PART C. OFFENDER CHARACTERISTICS

**Personal and Family Data**

53. DENISE ROCHELLE DeGROAT was born on February 26, 1958 in Saginaw, Michigan. She is the only child born to Roberta White and Celester DeGroat. Her parents were never married. The defendant was raised by her mother who provided the basic necessities. She did not have regular contact with her father; however, she would see him now and then. The defendant's six siblings are Chelaine Stevens, age 38, who resides at 2514 Bellevue, Saginaw Michigan; Keith Winfield, age 40, who is incarcerated within the state of Michigan; Royceann Porter, age 31, who resides in Iowa City, Iowa; Devonne Lenzie, age 25, who resides in Iowa City, Iowa; Celester DeGroat, age 24, who is in federal custody; and Kathy Hays, age 32, who resides on Perkins Street, Saginaw, Michigan.

54. The defendant has never been married; however, she does have three children born from different fathers. Her oldest is Deonte DeGroat, age 23, who is currently in federal custody. His father is Robert Roby. Her second child is Steven Glass, Jr., age 17, who resides at his mother's home at 1418 Chatham Drive,

Saginaw, Michigan. His father is Steven Glass. Her daughter, Chelaine Carey, age 13, resides with her father, Willie Carrey, Jr. MS. DeGROAT indicates that she was receiving $27.50 per week for child support for her son, Steven. However, she pays $32.00 bi-weekly in child support for Chelaine.

**Physical Condition**

55. DENISE DeGROAT is 5' tall and weighs 125 pounds. She has brown eyes and brown hair. She has a tattoo on her chest of "Nee Nee" and a scar over her left eye, on her right arm, and a stomach scar from a Caesarean delivery. MS. DeGROAT reported that she is in good health and is not taking any medications. MS. DeGROAT stated that her mother and her sister, Chelaine, are currently suffering from heart problems and are being treated by a physician.

**Mental and Emotional Health**

56. The defendant has never participated in any type of mental health counseling and has never been hospitalized for a mental health condition. She does indicate that some counseling at this time could be of benefit considering her current situation.

**Substance Abuse**

57. MS. DeGROAT denies any drug or alcohol abuse problems, nor has she received any type of counseling in the past.

**Education and Vocational Skills**

58. DENISE DeGROAT is a 1976 Saginaw High School graduate. She obtained her Associates Degree from

Delta College in April of 1987 and then attended Ferris State University. In May of 1989, MS. DeGROAT received her Bachelors Degree in Criminal Justice from Ferris State University.

**Employment Record**

59. Upon MS. DeGROAT's graduation in May of 1989, she was hired by the Saginaw City Police Department in August of 1989 as a law enforcement officer. MS. DeGROAT's employment continued from 1989 through November of 1996 when she was terminated from that position for the instant offense. MS. DeGROAT appears to have had a good work history record with no other problems.

60. Prior to MS. DeGROAT being employed by the Saginaw City Police Department, she worked for A&D Health Care at 3150 Enterprise Drive, Saginaw, Michigan from 1985 through 1987 as a nurse's assistant. Upon her termination from the Saginaw City Police Department, MS. DeGROAT obtained employment through A&D Health Care and worked as a nurse's assistant until the time of her incarceration. It does appear that she will be able to obtain employment upon her release as a nurse's assistant.

**Financial Condition: Ability to Pay**

61. The following information was received from the defendant and/or through verifications.

**Assets**

| | |
|---|---|
| Bank Accounts | |
| Savings | $5,030.00 |
| Equity in Other Assets | |
| 3742 York | 793.00 |
| 1418 Chatham | 1,411.00 |
| TOTAL ASSETS | $7,234.00 |

**Unsecured Debts**

| | |
|---|---|
| Credit Cards | $4,522.00 |
| TOTAL UNSECURED DEBTS | $4,522.00 |

| | |
|---|---|
| **Net Worth** | $2,712.00 |

**Monthly Net Income**

| | |
|---|---|
| Employment | $800.00 |
| Child Support | 110.00 |
| TOTAL MONTHLY INCOME | $910.00 |

**Monthly Necessary Living Expenses**

| | |
|---|---|
| Mortgage | $340.00 |
| Utilities | 173.00 |
| Telephone | 52.00 |
| Groceries/Supplies | 300.00 |
| Auto Insurance | 80.00 |
| Child Support Payment | 64.00 |
| TOTAL NECESSARY EXPENSES | $1,009.00 |

| | |
|---|---|
| **Net Monthly Cash Flow** | ($99.00) |

## PART D. SENTENCING OPTIONS

### Custody

62. STATUTORY PROVISIONS: **Docket Number 97-CR-20004-BC-11**, Count 1: 5 years to 40 years per 21 U.S.C. § 841(b)(i)(B). **Docket Number 96-CR-20042-BC-01**, Count 2: 5 years per 18 U.S.C. § 2232(b).

63. GUIDELINE PROVISIONS: Based upon a Total Offense Level of 36 and a Criminal History Category of I, the suggested custody range is 188 to 235 months.

### Supervised Release

64. STATUTORY PROVISIONS: **Docket Number 97-CR-20004-BC-11**, Count 1: At least 4 years per 21 U.S.C. § 841(b)(1)(B). **Docket Number 96-CR-20042-BC-01**, Count 2: Not more than 1 year per 18 U.S.C. § 3583(b)(3).

65. GUIDELINE PROVISIONS: **Docket Number 97-CR-20004-BC-11**, Count 1: 4 to 5 years per 5D1.2(b). **Docket Number 96-CR-20042-BC-01**, Count 2: 1 year per 5D1.2(a)(3).

### Probation

66. STATUTORY PROVISIONS: **Docket Number 97-CR-20004-BC-11**, Count 1: Ineligible per 18 U.S.C. § 3561(a)(1). **Docket Number 96-CR-20042-BC-01**, Count 2: Ineligible per 18 U.S.C. § 3561(a)(3).

67. GUIDELINE PROVISIONS: All counts: Ineligible per 5C1.1(f).

**Fines**

68. STATUTORY PROVISIONS: **Docket Number 97-CR-20004-BC-11**, Count 1: $2,000,000.00 per 21 U.S.C. § 841(b)(1)(B). **Docket Number 96-CR-20042-BC-01**, Count 2: $250,000.00 per 18 U.S.C. § 3571(b)(3).

69. GUIDELINE PROVISIONS: $20,000.00 to $2,000,000.00 per 5E1.2.

70. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release. 5E1.2(i). The most recent advisory from the administrative Office of the United States Courts dated March 28, 1997 suggests that a monthly cost of $1,910.17 be used for imprisonment, $217.18 for supervision, and $1,186.25 for community confinement.

71. A $100.00 special assessment fee per count (for a total of $200.00) is mandatory per 18 U.S. C. § 3013 and is to be paid prior to sentencing.

**Restitution**

72. Restitution is not an issue in this case.

**Denial of Federal Benefits**

73. STATUTORY PROVISIONS: Per 21 U.S.C. § 862(a)(1)(A), any individual who is convicted of any federal or state offense involving the distribution of a controlled substance, upon the first conviction for such an offense, may be ineligible for any and all federal benefits for up to five years. This is at the discretion of the Court.

74. GUIDELINE PROVISIONS: Section 5F1(6) of the *Guidelines Manual* indicates that denial of federal benefits is a sentencing option for drug convictions.

**PART E. FACTORS THAT MAY WARRANT DEPARTURE**

75. None.

Respectfully submitted,

Raymond L. Frank, Jr.
Chief U.S. Probation Officer

by /s/John D. Ade
John D. Ade
U.S. Probation Officer

Approved:

/s/ Fred S. Tryles/di
Fred S. Tryles
Supervising U.S. Probation Officer

JDA/dki

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ADDENDUM TO THE PRESENTENCE REPORT

United States v. DENISE DeGROAT, Docket Nos.: 97-CR-20004-BC-11 and 96-CR20042-BC-01

U.S. District Court, Eastern District of Michigan

The probation officer certifies that the presentence report including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the government, and that the content of the Addendum has been

communicated to counsel. The Addendum fairly states any objections they may have made.

OBJECTIONS

By the Government

The government had no objections.

By the Defendant

The defendant had two objections. However, they were later withdrawn as objections and will be addressed in a sentencing memorandum to the Court.

CERTIFIED BY

Raymond L. Frank, Jr., Chief
U.S. Probation Officer

By /s/ John D. Ade
John D. Ade
U.S. Probation Officer

Reviewed & Approved:

/s/ Fred S. Tryles/di
Fred S. Tryles, Supervising
U.S. Probation Officer

JDA/dki

UNITED STATES DISTRICT COURT
Eastern District of Michigan

UNITED STATES
OF AMERICA

v.

DENISE DEGROAT
Defendant.

Case Number CR 96-20042-BC
and CR 97-20004-BC-11
Honorable Robert H. Cleland

**JUDGMENT IN A CRIMINAL CASE**
**(For Offenses Committed On or After November 1, 1987)**

(Filed Jan. 21, 1998)

The defendant, was represented by **William Hatchett.**

**THE DEFENDANT:** was found guilty of Count 2 of the superseding indictment filed in Case No. 96-20042 and Count 1 of the superseding indictment in Case No. 97-20004-11. Defendant was found not guilty of count 1 of the superseding indictment filed in Case No. 96-20042 and that count has been dismissed.

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18 USC 2232(b) | Obstruction of Justice | 8/28/96 | 2 |
| 21 USC 846 | Conspiracy to possess with intent to distribute cocaine base | 10/2/96 | 1* |

*This count was under the superseding indictment filed in Docket No. 97-20004-BC-11.

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed: Jan. 21, 1998

January 15, 1998
Date of Imposition of Judgment

/s/ Robert H. Cleland
Robert H. Cleland
United States District Judge

Defendant's SSN: 363-64-2382
Defendant's Date of Birth: 2/26/58
Defendant's USM No.: 16803-039
Defendant's Residence Address: 1418 Chatham Drive; Saginaw, MI 48601

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **60** months on count 2 of Docket No. 96-20042-BC, and for a term of **192** months on count 1 of Docket No. 97-20004-BC-11. The terms of imprisonment shall run concurrently.

■ The defendant is remanded to the custody of the United States Marshal.

* * *

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four years. This consists of a term of one year on count two of docket number 96-20042 and four years on count one of docket number 97-20004-BC-11. The terms of supervised release shall run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 *hours* of release from the custody of the Bureau of Prisons.

- The defendant shall not commit another federal, state or local crime.
- The defendant shall not illegally possess a controlled substance.

## FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 13, 1994

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within **15 days** of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- The defendant shall not own or posses a firearm, destructive device, or dangerous weapon as defined in 18 U.S.C. § 921.

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay, as directed by the Probation Office, any such fine, assessments, costs, or restitution that remains

unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with any additional conditions as listed on the attached page entitled special conditions of supervision

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

1. **The defendant shall not use or possess alcohol in any consumable form, nor shall she be in the social company of any person who is in possession of alcohol or illegal drugs or who is visibly affected by their use. The defendant shall not be found at any place that serves alcohol for compution [sic] on the premises, with the exception of restaurants.**

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **Totals:** | **$200.00** | | |

## FINE

■ Due to the defendant's financial circumstances, no fine or cost of incarceration or supervision are being imposed.

The defendant shall pay interest on any fine of more than *$2,500, unless the fine is paid in full before the fifteenth day (15th) day after the date of judgment,* pursuant to 18 U.S.C. § 3612(f). All of the payment options in Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties

**PAYMENT OF TOTAL FINE AND OTHER CRIMINAL MONETARY PENALTIES SHALL BE DUE AS FOLLOWS:**

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

## STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

| | |
|---|---|
| Total Offense Level: | **36** |
| Criminal History Category: | **1** |
| Imprisonment Range: | 188 months to 235 months in 97-20004-BC 60 months in 96-20042- concurrent |
| Supervised Release Range: | 1 year in 96-20042 4-5 years in 97-20004 concurrent |
| Fine Range: | $ 20,000 to $ 2,000,000 |
| Total Amount of Restitution: | $ |

■ The sentence is within the guideline range, that range exceeds 24 months, and the court chose a sentence near the low end of the guideline range to reflect the relative role of this defendant with respect to the drugs for which she was accountable.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
NORTHERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

-v-

CELESTER DEGROAT,
DENISE DEGROAT &
ANDRE PRUITT,

Defendants.
_____/

No. 97-20004

VOLUME II

(Filed Apr. 8, 1998)

Proceedings had and testimony taken in the above-entitled matter before the Honorable Robert H. Cleland, United States District Judge, at Bay City, Michigan, on the 19th day of August, 1997.

* * *

[97] A Andre Pruitt.

Q And what happened when you got there?

Did you know any of these other people before that?

A No, I had met none of them. He introduced me to these guys as his friend from California. He then introduced me to his guys from Saginaw, his posse, the guys he was telling me about, referring to them when he was in California.

Q Now you used the term posse.

A Correct.

Q Is that what you said?

A Yes, like gang.

Q All right. Was there a particular name that these individuals used to refer to their organization?

A 4th and Kirk.

Q And you indicated that one of the individuals that was at the house that you met was a person named Andre Pruitt.

A Correct.

Q Is that person in the courtroom today?

A Yes, he is.

Q Where is he seated?

A He's seated two persons to my right.

MR. HLUCHANIUK: May the record reflect the witness has referred to the defendant, Andre Pruitt.

A Yes.

Q I'm showing you a photograph marked as exhibit number [98] 205, do you recognize what's shown in that photograph, sir?

A Yes, I do.

Q What is that?

A This is the house on 9th Street I was taken to.

Q All right. So you go to the house, you meet these other individuals and then what happens?

A Celester gets the drugs from me, he distributes the drugs out among the guys there.

Q And what quantities was he distributing out to these individuals?

A Ounces.

Q And how did he do that?

A Got an ounce out – it was bagged up, nine ounces, it was bagged up in individual ounces, 28 grams per bag.

Q All right. So the nine ounces that you brought was already divided up into ounce bags?

A Correct.

Q And what kind of bags were they?

A Sandwich bags, twisted with a knot on the top.

Q That happened in your presence?

A Yeah, I did that myself in California just to make sure there wouldn't be no problems as far as what it was worth, how much did it weigh or if I get here it's not what it's supposed to be. Just so there would be no problems.

Q So you had, in California, measured out these [99] individual ounce bags?

A The guy I got it from, me and him did it together.

Q What did you use to weigh out an ounce of crack cocaine?

A A triple beam scale.

Q So you're back at this house on 9th Street and these ounce bags are then divided up amongst some or all of the people that were there?

A Correct.

Q Did each of those individuals that you mentioned get some of that cocaine?

A No, everybody didn't get some. I mean the guys that were closest to them at that time, he made sure they had some, but then other guys that wasn't closest to him, wasn't his friends I guess – I don't understands the situation, what was going on up here – but he had some – some drugs he gave to some guys and some guys he didn't give drugs to.

Q Do you know which individuals got drugs on that occasion and which ones did not?

A Yeah, he got drugs, Jay Lou, he gave drugs to Lemont, Demont, Eric, Derrick – Eric, Derrick. Those guys were given ounces. He then opened an ounce, cut it up in rocks, he cut about, I would say, $500 worth of rocks. He gave that to Andre Pruitt and told him to bring him $200 back.

Q Did anything else happen while you were there on that [100] particular occasion?

A His sister came by.

Q Who's sister?

A Whack's sister.

Q And what happened when she got there?

A She came by, informed him the house was under surveillance, that he better stop selling rocks out of that house because the house was under surveillance by the Saginaw police.

Q Was she in uniform when she came to that house?

A No, she was regular dressed, had on regular clothes. I think she was going to a club or something. I'm not exactly sure what she was doing but she seemed to be dressed up.

Q Do you remember what time of day approximately this would have happened, was it the morning or the afternoon or the evening?

A It was night time.

Q And what were her exact words; to the best of your recollection?

A Better stop selling dope out of this house, because this house is under surveillance.

Q Who did she say that to?

A She said it to her brother.

Q Were you introduced to her at that time?

A No, I was in the living room. What I'm saying, I was

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
NORTHERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

-v-

DENISE DEGROAT,

Defendant.
_____/

No. 97-20004

SENTENCE

Proceedings had and testimony taken in the above-entitled matter before the Honorable Robert H. Cleland, United States District Judge, at Bay City, Michigan, on the 15th day of January, 1998.

* * *

[3] MR. HATCHETT: Your Honor, I think the memorandum adequately covered the issues that I thought were relevant and that I thought needed to be raised so I have no further comment with respect to that issue.

THE COURT: All right. Mr. Hluchaniuk?

MR. HLUCHANIUK: I have no further comment. I would like the record, perhaps, to reflect that the defendant has had the opportunity to go over the presentence report with counsel.

THE COURT: All right, I'll handle that in a few moments.

MR. HLUCHANIUK: Thank you. I have no further comments with respect to that issue.

THE COURT: All right. I'll take the matter as submitted then on the sentencing memorandum with respect to any consideration of 1B1.3, or any implication that a downward departure may flow from any of the things suggested by Mr. Hatchett in his sentencing memorandum. Now the presentence report, as I said, was prepared by the probation officer and submitted to counsel for their review. It met with no objections either from the government or from the defendant.

The probation officer suggests a calculation which results ultimately in an offense level of 36 and a criminal history category of Roman Numeral I.

[4] The level 36 results from a base offense level of 34 in view of the defendant being held responsible for what I believe is the one shipment of nine ounces of crack cocaine. That would be correct, 255.15 grams of crack cocaine is equivalent to nine ounces. That's a level 34.

The defendant is suggested by the probation officer to have been a minor participant in the criminal activity, specifically that is in the drug distribution activity for which she is held responsible, and the probation officer suggests a two level downward departure from that level 34.

Next the probation officer suggests that because the defendant abused a position of public trust in a manner that significantly facilitated the commission of the

offense, she should receive a two level upward adjustment. And finally and [sic] adjustment for obstruction consistent with 3C1.1 application note 6, a two level increase is to be applied. That would result in a level 36.

Roman Numeral I, apparently there's no criminal history, at least none that results in any crime scoring. I think there was none at all, I'm not aware of any arrests.

But in any event, 36 and Roman Numeral I with a guideline range of 188 months minimum and 235 months maximum.

So within that range, unless there were a departure, the court is required to sentence the defendant to at least 188 months but not to exceed the 235 months of [5] imprisonment, plus supervised release and so on.

Now the parties had an opportunity to go over this Mr. Hluchaniuk, it's correct the government filed no objection and has no objection to the factual suggestions made in the presentence report, correct?

MR. HLUCHANIUK: That is correct, your Honor. I a did suggest in my sentencing memorandum an alternate approach to the application of the guidelines to these facts. I put that for the court's consideration, and –

THE COURT: It was predicated, I think, on an assumption that, as you put it, assuming such facts were true. This was page four of your memorandum: Defendant maintains the evidence did not show that she sold drugs or did other things directly related to the distribution of drugs, you went on to say, assuming those facts to be true there may be an alternate guideline application, right?

MR. HLUCHANIUK: Correct.

THE COURT: I noted that and I'm not sure that my – I discussed the mechanics of that calculation with the probation officer.

THE COURT: The defendant also filed no objection or controverted items to the factual matters contained in the presentence report. You did, I trust, have an opportunity fully to go over this with the defendant, to solicit her comments, to explain it to her, to tell her what these things [6] meant and the so on. Is all of that correct?

MR. HATCHETT: That's correct, your Honor.

THE COURT: It's also correct you filed and intended to file no objections to the report, the factual matters, but rather put this departure question to me in the form of a memorandum; correct?

MR. HATCHETT: That's correct, your Honor.

THE COURT: All right. I find myself in the unusual position of urging you to adopt Mr. Hluchaniuk's theory.

THE COURT: Well I can understand that, and there will be a time to comment on that I think, from my perspective as well, because I have thought about that. There's a little bit more complexity to it than I think what Mr. Hluchaniuk suggested in terms of calculations and that, as a matter of fact.

But that's a matter which perhaps we should resolve before we go any further since it really is not a departure, it's an alternate guideline calculation possibility that he raised, as I mentioned.

Mr. Hluchaniuk near the end miss [sic] his memorandum assumed certain facts to be true, that is, specifically and importantly that the defendant did not do other things directly related to the distribution of drugs.

That is an unwarranted factual assumption. I would

* * *

[11] the facts established by the evidence at trial, I'm not sure that I fully appreciate what other things this defendant might have done beyond the warnings and the provision of information that she gave. I took that into account when I came up with what I proffered to the court as an alternate theory.

I looked at and thought about everything the evidence indicated the defendant had done in this case, and I truly believe that the evidence showed that she provided information. But I didn't view that as directly related to, in a sense, transporting drugs, transporting money that was payment for drugs. I think that there was, perhaps, an absence of that sort of evidence, that's why I suggested this other theory that would construe her offense conduct more as an obstruction than categorized in the traditional fashion drug cases are.

THE COURT: Do you think the evidence did not in some way support the conspiracy conviction?

MR. HLUCHANIUK: No, I clearly think she's guilty, and the evidence supported her conviction for being guilty of the conspiracy. But when I parse out what she did to contribute to that conspiracy, her efforts to pursue that conspiracy I think were different than many

of the other individuals; perhaps all the other individuals.

All the other individuals that either pleaded guilty or were found guilty had some direct role selling drugs, storing drugs, transporting drugs. And I think this defendant's conduct was distinguished from those other individuals.

Clearly I think the evidence shows that she was guilty. I argued that to the jury, I believe that to this day, that she's guilty of being in that conspiracy. But the precise role that she played in the conspiracy I believe differs from that of the other defendants in the way that I think I have described it.

That's just the way I see it.

THE COURT: Do you disagree your alternative calculation depends on the assumptions, the factual assumptions, I spoke of? Assuming as you put it, assuming those other facts to be true? In other words, that she did not do things that amount to participation in drug distribution?

MR. HLUCHANIUK: I think that's true. I believe the application of the guideline provision that I suggested were as a result of a factual determination, perhaps the predicate facts for the application of those guideline provisions were that the defendant here, her role was somewhat different than a traditional participant in a drug conspiracy.

So I think yes, there has to be a factual finding

* * *

[17] police officer, there is none at all. It is, in my view, fruitless to suggest that your sentence should be lower simply because a lack of evidence that you profited in dollars from the crimes you committed.

You profited in other ways, in social ways and in family relationships. You profited by the assurance that your brother's common law wife or girlfriend, however you phrased, it would be relatively more secure from detection and apprehension, and you profited from the association with others that you apparently found more beneficial than associating with law abiding people.

And I do not accept the proposition that you, in the evidence here, did things that amount to less than direct participation in drug distribution. The evidence to me is clear that you did participate by actively assisting, at a minimum by helping, to warn others about Detective Leatherman for example.

I find no departure from the guideline sentence is warranted. I find you, frankly, deserve the sentence that is provided for under the law and we'll proceed with that.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant Denise DeGroat is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months on case number 97-CR-20004, count 1.

* * *

Supreme Court, U.S.
FILED
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No. 00-366

# In the Supreme Court of the United States

DENISE DEGROAT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court committed plain error at sentencing when it held petitioner responsible for nine ounces of crack cocaine.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is unpublished, but the decision is noted at 211 F.3d 1270 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on April 20, 2000. The petition for a writ of certiorari was filed on July 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine base (crack) with the intent to distribute it, in violation of 21 U.S.C. 846, and of obstructing justice, in violation of 18 U.S.C. 2232(b). The district court sentenced her to a term of 192 months' imprisonment, to be followed by a four-year period of supervised release. The court of appeals affirmed in part and reversed in part. Pet. App. 1-29.

1. Petitioner was a police officer in Saginaw, Michigan. Her brother Celester DeGroat and Eugene Beaver had been childhood friends in California. Celester eventually moved to Michigan. In January 1993, on a return trip to California to visit his mother, Celester told Beaver, who was also a drug dealer, about the drug business that he and his friends were operating in Saginaw. He also told Beaver that his sister was a Saginaw police officer who would let them know if they were being watched or an investigation was underway. Pet. App. 36-37; Gov't C.A. Br. 5.

Celester and Beaver subsequently approached Beaver's friend, Terry Gear, from whom they obtained nine ounces of crack. In January 1993, Beaver hid the drugs in a pillow and transported them by bus to Saginaw. Beaver, Celester, and a third man then went to a house on Ninth Street where they met several of Celester's drug trafficking associates, who were known collectively as the Fourth and Kirk Posse (4KP) after the intersection that was the primary location for their retail drug sales. Celester distributed Beaver's crack to his associates in one-ounce baggies. That evening, petitioner came to the house and told Celester to stop

selling drugs from that location because it was under police surveillance. See Pet. App. 37; Gov't C.A. Br. 5-6.

Although a number of people affiliated with the 4KP were arrested in October 1994, the group's drug trafficking operations continued through 1995 and most of 1996. On one occasion in August 1996, petitioner warned one of the gang members, Alfreda Brewer, not to sell drugs to an individual whom petitioner recognized as an undercover police officer. Petitioner, Celester, and others were ultimately arrested in October 1996. See Pet. App. 4, 41-43; Gov't C.A. Br. 6-19.

2. Following the jury's verdict, the probation office prepared petitioner's Presentence Report (PSR). See Pet. App. 30-53. The PSR determined that petitioner was responsible for 255.15 grams (nine ounces) of crack, based on Beaver's first delivery to the 4KP in January 1993. *Id.* at 43. The PSR calculated petitioner's total offense level as 36, which included a base offense level of 34, a two-level reduction because petitioner was a minor participant in the drug conspiracy offense, a two-level increase for abusing a position of public trust, and a two-level increase for obstructing justice. *Id.* at 44-45. The PSR further determined that petitioner's criminal history category was I and her Guidelines sentencing range was 188-235 months' imprisonment. See *id.* at 45, 50.

Petitioner did not object to the PSR's attribution to her of the nine ounces of crack cocaine. Instead, she urged the district court to depart downward from the Guidelines range on the grounds that (1) she was not directly involved in the sale of any controlled substances, and (2) she would have received a lesser sentence if she had been convicted of the same offenses in state court. See Addendum to PSR, at 1-4 (Dec. 10,

1997); Pet. Sent. Mem. 1-2 (Dec. 24, 1997). In response, the government argued that the grounds advanced by petitioner were not appropriate bases for a downward departure. See Gov't Sent. Mem. 1-4 (Jan. 12, 1998). The government suggested, however, that petitioner might be sentenced under the obstruction-of-justice Guideline, Section 2J1.2, which would have produced a sentencing range of 97-121 months' imprisonment. See Gov't Sent. Mem. 4-5 (Jan. 12, 1998).

At sentencing, the district court confirmed that petitioner had not objected to the PSR, and had instead relied solely on her departure motion. Pet. App. 70. The court then rejected the government's suggestion that petitioner might be sentenced under the obstruction-of-justice Guideline, finding that petitioner was not a mere accessory after the fact, but had directly facilitated the 4KP's drug distribution activities. Sent. Tr. 6-8 (Jan. 15, 1998). The court observed that "[t]he jury deliberated long and hard on this matter, considering fairly and properly introduced evidence[,] and fairly and properly[,] based upon overwhelming, clearly supported evidence, they found [petitioner] guilty." *Id.* at 15. The court also stated that it "d[id] not accept the proposition that [petitioner] * * * did things that amount to less than direct participation in drug distribution." *Id.* at 17. The court found that a downward departure was unwarranted and imposed a sentence of 192 months' imprisonment. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1-29. Petitioner argued that the evidence did not support her obstruction-of-justice and drug conspiracy convictions, see Pet. C.A. Br. 5-13; that the district court was biased against her, see *id.* at 14-22; and that the district court had committed plain error in holding her responsible for nine ounces of crack

without determining that the amount was within the scope of her conspiratorial agreement, *id.* at 23-27. The government argued that petitioner had waived her sentencing claim, explaining that because petitioner had not objected to the PSR's recommendations, "the district court had no reason to explain his findings or to develop the record further." Gov't C.A. Br. 73.

After oral argument in the court of appeals, petitioner filed a supplemental brief in which she contended that the government had not shown that a seizure was imminent when she warned Brewer not to sell drugs to the undercover officer, and that the evidence therefore was insufficient to establish a violation of 18 U.S.C. 2232(b).[1] See Pet. Supp. C.A. Br. 1-4. The government responded that the statute applies broadly to "possible" searches or seizures. See Gov't Supp. C.A. Br. 5-8.

The court of appeals reversed petitioner's conviction under Section 2232(b) and remanded for a new trial. The court held that the district court had committed plain error when it instructed the jury that the undercover officer's intended purchase of crack from Brewer was a "seizure" of the drug. See Pet. App. 11-13.[2] The

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[1] Section 2232(b) provides:

> Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined under this title or imprisoned not more than five years, or both.

[2] On June 20, 2000, after the decision of the court of appeals, the district court dismissed the Section 2232(b) charge against petitioner on the government's motion. See Mot. and Order for Dismissal 1.

court rejected all of petitioner's other claims without specifically addressing her contention that the district court had committed plain error at sentencing in holding her responsible for nine ounces of crack. See *id.* at 1-2, 8-10, 13-14, 21-23, 28.

**ARGUMENT**

1. Petitioner contends (Pet. 2-7) that the district court committed plain error at sentencing by accepting the PSR's attribution to her of nine ounces of crack cocaine (the amount transported by Beaver on hi first trip to Saginaw in January 1993) without making particularized findings as to the scope of petitioner's conspiratorial agreement. Petitioner acknowledges (*e.g.*, Pet. 5-6) that she did not contest the quantity of drugs attributed to her until the case was on appeal. Accordingly, she must establish that the court's finding constituted plain error under Federal Rule of Criminal Procedure 52(b), which requires a showing that (1) there was error, (2) the error was "plain," (3) the error "affect[ed] substantial rights," and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Petitioner's claim lacks merit and does not warrant this Court's review.

a. Because petitioner did not dispute the PSR's attribution to her of nine ounces of crack, the district court was not required to make particularized findings about the scope of her conspiratorial agreement. Federal Rule of Criminal Procedure 32(c)(1) provides that "[f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." At the sentencing hearing, peti-

tioner merely urged the court to depart downward from the presumptive sentencing range established by the Guidelines. See Pet. App. 70. She neither disputed the PSR's attribution to her of nine ounces of crack nor offered any evidence that would cast doubt on the PSR's drug quantity assessment. Because the quantity of drugs attributable to petitioner was not a "matter controverted" by the parties, the district court had no obligation to develop the record with respect to that question. See *United States* v. *Catucci*, 55 F.3d 15, 19 (1st Cir. 1995) (absent a claim of factual inaccuracy, Rule 32 requirements are not implicated).

b. Even if the district court's failure to make particularized findings as to the scope of petitioner's agreement were erroneous, that error would not warrant correction under Rule 52(b). Petitioner cannot show that any error affected her substantial rights, or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). The attribution to petitioner of nine ounces of crack cocaine was amply supported by the government's proof. Trial evidence that the district court characterized as "overwhelming," Sent. Tr. 15 (Jan. 15, 1998), established that petitioner played a real, though minor, role in the 4KP drug conspiracy over a four-year period from 1993 to 1997. See Gov't C.A. Br. 5-6, 12-16.

If anything, the PSR's attribution to petitioner of nine ounces of crack—the amount involved in the January 1993 transaction in which she warned Celester not to sell the drugs from the house on Ninth Street (see pp. 2-3, *supra*)—substantially understated the amount of crack that she could have reasonably foreseen as a member of the 4KP conspiracy during the relevant four-year period. The government's evidence

showed that in addition to providing her co-conspirators with information about police activities over that period, petitioner was present during multiple retail drug sales by her co-conspirators at a busy, open-air drug market in July, August, and September 1996, see Gov' C.A. Br. 13-16; was present when illegal drugs were used or prepared for distribution, see *id.* at 16; and provided a co-conspirator with the name of a drug source, see *ibid.* Cf. Guidelines § 1B1.3(a)(1)(B) (conspirators should be sentenced on the basis of all reasonably foreseeable acts of others committed in furtherance of jointly undertaken criminal activity). Accordingly, the district court's attribution to petitioner of nine ounces of crack without making particularized findings as to the scope of her agreement did not violate her substantial rights, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, and was not plain error. See Fed. R. Crim. P. 52(b); *Johnson*, 520 U.S. at 466-467.[3]

c. Contrary to petitioner's suggestion (Pet. 2-4), the decision of the court of appeals in this case does not conflict with decisions of other circuits. None of the cases

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[3] Petitioner's argument (see Pet. 6-7) that her sentence represented a miscarriage of justice because she never handled or sold drugs is wholly without merit. The handling or selling of drugs is not an element of a drug conspiracy offense under 21 U.S.C. 846. It is enough that (1) an agreement to distribute drugs existed between two or more persons, (2) the defendant knew of the object of the conspiracy, and (3) the defendant knowingly joined or participated in the illegal venture. See, *e.g.*, *United States* v. *Matthews*, 168 F.3d 1234, 1245 (11th Cir.), cert. denied, 120 S. Ct. 199, 438, and 454 (1999). Here the district court correctly found, on the basis of "overwhelming" evidence, see Sent. Tr. 15 (Jan. 15, 1998), that petitioner had joined the illegal 4KP venture and had facilitated its activities by informing her co-conspirators of relevant law enforcement efforts.

on which petitioner relies holds that, in the absence of an objection by the defendant, a sentencing court commits plain error by failing to make particularized findings as to the scope of a drug conspirator's agreement. Indeed, none of those cases involves a claim of plain error at sentencing.

3. Several weeks after the court of appeals decided petitioner's case, this Court issued its decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). *Apprendi* holds, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363. Although the district court in this case did sentence petitioner based on the court's own finding as to drug quantity, nothing in *Apprendi* calls into question the constitutionality of the sentence that petitioner received.

A jury found petitioner guilty of conspiring to possess cocaine base, a Schedule II controlled substance under 21 U.S.C. 812(c) (Sch. II (a)(4)). See 21 U.S.C. 846. Federal law authorizes "a term of imprisonment of not more than 20 years [240 months]" for a defendant who, like petitioner, has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance. 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998). Petitioner was sentenced to a term of 192 months' imprisonment, a sentence that was within the statutory maximum established by Section 841(b)(1)(C).

Thus, although the involvement of certain threshold drug quantities may trigger the applicability of higher maximum sentences under Section 841(b), petitioner's 192-month sentence was authorized by that statute without regard to the specific quantity of cocaine base

involved in her offense. Accordingly, *Apprendi* provides no basis for an argument that the term of imprisonment imposed on petitioner was unconstitutional. See *United States* v. *Doggett*, 230 F.3d 160, 165 (5th Cir. 2000); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 932-934 (8th Cir.), cert. denied, No. 00-6746 (Nov. 27, 2000). This Court has recently denied several petitions for certiorari raising similar challenges to sentences imposed under 21 U.S.C. 841 (1994 & Supp. IV 1998) that were within the lowest applicable statutory maximum under Section 841(b)(1)(C). See, *e.g.*, *Rios-Quintero* v. *United States*, 121 S. Ct. 301 (2000) (No. 99-9905); *Anthony* v. *United States*, 121 S. Ct. 313 (2000) (No. 00-5188); *Littles* v. *United States*, 121 S. Ct. 81 (2000) (No. 99-8992); *Foye* v. *United States*, 121 S. Ct. 153 (2000) (No. 99-10143); *Medina* v. *United States*, 121 S. Ct. 157 (2000) (No. 99-10173).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000